

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MUTUAL OF ENUMCLAW
INSURANCE CO. as subrogee of
China City, LLC,

Plaintiff,

v.

BRADFORD WHITE
CORPORATION,

Defendant.

CASE NO. C23-455

ORDER ON MOTION FOR
CONTEMPT AND SANCTION
AND MOTION TO STRIKE
EXPERT REPORT

This matter comes before the Court on Defendant's Motion for Contempt and Sanctions (Dkt. No. 20), and Motion to Strike Plaintiff's Expert Report (Dkt. No. 23). Having reviewed the Motions, Plaintiff's Responses (Dkt. Nos. 27, 28), the Replies (Dkt. Nos. 29, 30), and having held oral argument on April 16, 2024, the Court GRANTS both Motions.

Also before the Court is Plaintiff's Motion for Leave to File Response to Motion to Strike and Motion for Contempt. (Dkt. No. 26.) Plaintiff's counsel filed his responses two days after the deadline due to erroneously calculating the response date as a second Friday motion under Local

Civil Rule 7(d)(2) instead of a third Friday motion. The Court finds the two day delay harmless and GRANTS Plaintiff's Motion for Leave to file Response.

BACKGROUND

On February 13, 2020, a water heater manufactured by Defendant allegedly failed at the restaurant China City. (Mot. for Contempt at 2.) The restaurant then closed for repairs, and now Plaintiff Mutual of Enumclaw Insurance, as subrogee of China City, seeks damages from Defendant for the cost of repairs and business interruption losses that it paid out to China City from February through May 30, 2020. (*Id.*)

On December 18, 2023, the Court granted in part and denied in part Defendant's Motion to Compel. (Dkt. No. 16.) The Court ordered Plaintiff to produce various financial documentation from China City for all three of its restaurants for the years 2018-2021. (Order at 3.) Defendant now seeks an order barring Plaintiff from putting forth any evidence regarding business interruption losses on the grounds that Plaintiff failed to produce the requested financial documents it was ordered to produce. Defendant also seeks to strike Plaintiff's Expert Report for failing to comply with the Federal Rules of Civil Procedure.

ANALYSIS

A. Motion for Contempt and Sanctions

Federal Rule of Civil Procedure 37(b)(2)(A) allows the Court to issue sanctions against a party for failing to obey an order to provide or permit discovery. These sanctions may include:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for the purposes of the action;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying proceedings until the order is obeyed;

- 1 (v) dismissing the action in whole or in part;
- 2 (vi) rendering a default judgment against the disobedient party; or
- 3 (vii) treating as contempt of court the failure to obey

4 District courts are given wide latitude to issue sanctions under Rule 37. Yeti by Molly,
5 Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). But sanctions are not
6 appropriate if the failure to disclose is substantially justified or harmless. Id. “To that end, district
7 courts have identified several factors to guide the determination of whether substantial
8 justification and harmlessness exist, including (1) prejudice or surprise to the party against whom
9 the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of
10 disruption of trial; and (4) bad faith or willfulness in not timely disclosing the evidence.” Liberty
11 Ins. Corp. v. Brodeur, 41 F.4th 1185, 1192 (9th Cir. 2022).

12 The factors here weigh in favor of a sanction. Plaintiff claims it produced all the records
13 it has possession of: (1) the net sales for all three restaurants in 2020; (2) Excise Tax Returns for
14 2018-2020; (3) Federal Tax Returns from 2018-2021; and (4) balance sheet and profit & loss
15 statements from January 2018 – December 2020. (Response at 2.) But Plaintiff is not obligated
16 to only produce what it has in its possession; rather the records that exist, whether or not it is
17 currently in possession of them. Plaintiff’s own expert stated she relied on documents in making
18 her damages calculation, which have never been turned over to Plaintiff or Defendant because
19 the files are stored at an offsite facility, and she works from home. (Declaration of Melody Ewers
20 at 2 (Dkt. No. 27-1).) This is not a valid justification for defying the Court’s Order to produce
21 such documents. Further, the documents that were produced are incomplete. (Reply at 4.) For
22 instance, the Excise Tax Documents only contain tax data for February through December of
23 2018 (Dkt. 21-4 at 1-21), July and September of 2019 (id. at 22-25), and January -May, and July
24 – September 2020 (id. at 26-38). Even in Defendant could utilize the type of data produced to

1 make its own calculations as to business interruption damages, it does not possess a complete set
2 of data to do so. Because Plaintiff steps into the shoes of its subrogee China City, it cannot use
3 China City or its expert as a scapegoat for failing to produce discovery documents. Business
4 interruption damages are something Plaintiff would have to demonstrate at trial. It cannot bring a
5 claim and then deny Defendant the documents it needs to defend against that claim. The Court
6 GRANTS Defendant's Motion and precludes Plaintiff from presenting evidence regarding its
7 alleged business interruption losses at trial.

8 **B. Motion to Strike**

9 Defendant asks the Court to exclude Plaintiff's expert from offering any testimony or
10 using her expert report as evidence to support its claim regarding business interruption losses.
11 Despite the fact the Court is granting Defendant's Motion for Contempt and Sanctions and
12 preventing Plaintiff from putting forth evidence on business interruption losses, the Court
13 nevertheless GRANTS Defendant's Motion to Strike.

14 Federal Rule of Civil Procedure 26 requires parties to disclose the identities of each
15 expert and, for retained experts, requires that the disclosure includes the experts' written reports.
16 Fed. R. Civ. P. 26(a)(2). These written reports must include:

- 17 (1) A complete statement of all opinions the witness will express and the basis and reasons
18 for them;
- 19 (2) The facts or data considered by the witness in forming them;
- 20 (3) Any exhibits that will be used to summarize or support them;
- 21 (4) The witness's qualifications, including a list of all publications authored in the previous
22 10 years;
- 23 (5) A list of all other cases in which, during the previous 4 years, the witness testified as an
24 expert at trial or by deposition; and
- (6) A statement of the compensation to be paid for the study and testimony in the case.

1 Fed. R. Civ. P. 26(a)(2)(B).

2 The expert report required by Rule 26 must be “detailed and complete” and must “stat[e]
3 the testimony the witness is expected to present during direct examination together with the
4 reasons therefore.” Fed. R. Civ. P. 26 advisory committee’s notes to 1993 amendment. Other
5 lower courts in the Ninth Circuit have held that “[t]he reason for requiring expert reports is the
6 elimination of unfair surprise to the opposing party and the conservation of resources.” Elgas v.
7 Colorado Belle Corp., 179 F.R.D. 296, 299 (D. Nev. 1998) (internal quotation and citation
8 omitted). “The test of a report is whether it was sufficiently complete, detailed and in compliance
9 with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are
10 reduced.” Id.

11 “Rule 37 gives teeth to Rule 26’s disclosure requirements by forbidding the use at trial of
12 any information that is not properly disclosed.” Goodman v. Staples the Office Superstore LLC,
13 644 F.3d 817, 827 (9th Cir. 2011) (citing Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259
14 F.3d 1101, 1106 (9th Cir. 2001) and Fed. R. Civ. P. 37(c)(1)). “Rule 37(c)(1) is a self-executing,
15 automatic sanction designed to provide a strong inducement for disclosure.” Id. (internal
16 quotation and citation omitted). The only exceptions to Rule 37(c)(1)’s exclusion sanction apply
17 if the failure to disclose is substantially justified or harmless. Fed. R. Civ. P. 37(c)(1). “The
18 burden to prove harmlessness is on the party seeking to avoid Rule 37’s exclusionary sanction.”
19 Goodman, 644 F.3d at 827 (internal citation omitted).

20 As an initial matter, Plaintiff contends that Melody Ewers, a manager at BakerTilly – a
21 consulting and accounting firm – who Plaintiff hired to work on China City’s claim, is not an
22 expert witness but a fact witness. (Response at 2.) This argument is unpersuasive. Plaintiff’s own
23 response brief admits that Ewers and BakerTilly “were hired . . . to assist MOE with the
24 economic damages part of the claim.” (Id. at 3.) If Ewers were to testify, she would be testifying

1 as to her expertise and how she analyzed China City's claim to determine the amount of damages
2 owed. This is the epitome of an expert witness.

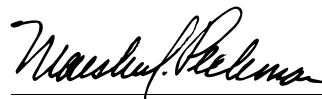
3 Turning to Ewer's report, the Court finds Plaintiff's expert report to be wholly
4 inadequate. Ewer's "report" is not a report but a series of spreadsheets. There is no written
5 documentation for Defendant to use to determine whether Ewer's analysis was correct because
6 no analysis was provided. And it is unclear whether she prepared these spreadsheets or simply
7 reviewed them when processing China City's claim. Because the "report" is not a report in the
8 most generous of interpretations, the Court finds the report fails to comply with Federal Rule of
9 Civil Procedure 26. The Court GRANTS Defendant's Motion to Strike and precludes Ewers
10 from offering any testimony during trial or using her report.

11 CONCLUSION

12 The Court GRANTS Plaintiff's Motion for Leave to File Response to Motion to Strike
13 and Motion for Contempt. And after considering all the briefs and supporting materials, the
14 Court GRANTS Defendant's Motion for Contempt and for Sanctions and PRECLUDES Plaintiff
15 from presenting any evidence on business interruption losses. The Court further GRANTS
16 Defendant's Motion to Strike and PRECLUDES Plaintiff's expert from offering any testimony
17 or from using her report.

18 The clerk is ordered to provide copies of this order to all counsel.

19 Dated April 17, 2024.

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21 Marsha J. Pechman
22 United States Senior District Judge
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